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October 29, 2004

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: June 30, 2004

Case No.: TIA-0129

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' benefits for her late husband, XXXXXXXXXXXX (the Worker). The OWA referred the application to an independent Physician Panel (the Panel), which determined that the worker's illnesses were not related to his work at the DOE. The OWA accepted the Panel's determination, and the Applicant filed an Appeal with the DOE's Office of Hearings and Appeals (OHA), challenging the Panel's determination.

I. Background

The Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. The Act provides for two programs, one of which is administered by the DOE.¹

The DOE program is intended to aid DOE contractor employees in obtaining workers' compensation benefits under state law. Under the DOE program, an independent physician panel assesses whether a claimed illness or death arose out of

¹ The Department of Labor administers the other program. See 10 C.F.R. Part 30; www.dol.gov.esa.

and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385(d)(3). In general, if a physician panel issues a determination favorable to the employee, the DOE instructs the DOE contractor not to contest a claim for state workers' compensation benefits unless required by law to do so, and the DOE does not reimburse the contractor for any costs that it incurs if it contests the claim. 42 U.S.C. § 7385o(e)(3). As the foregoing indicates, the DOE program itself does not provide any monetary or medical benefits.

To implement the program, the DOE has issued regulations, which are referred to as the Physician Panel Rule. 10 C.F.R. Part 852. The OWA is responsible for this program and has a web site that provides extensive information concerning the program.²

B. Procedural Background

The Applicant's late husband was employed as a laborer and a janitor at DOE's Oak Ridge site. He worked at the site for approximately 27 years, from 1967 to 1994.

The Applicant filed an application with OWA, requesting physician panel review of two illnesses, kidney disease and asbestosis. The Applicant claimed that her late husband's illness was a result of working for many years in different buildings of the Oak Ridge site in which he may have been exposed to toxic substances. The Physician Panel rendered a negative determination with regard to both of the claimed illnesses. The Panel agreed that the Applicant had the claimed kidney disease, but stated that the illness was not a result of a toxic exposure at the DOE site. The Panel also determined that Worker did not have the claimed asbestosis.

The OWA accepted the Physician Panel's negative determinations with respect to the two claimed illnesses: the kidney disease and the asbestosis.

In her appeal, the Applicant maintains that the negative determination regarding asbestosis is incorrect. The Applicant contends that her late husband was exposed to asbestos during the entire time that he was employed at the Oak Ridge site. In support of this assertion, the

² See www.eh.doe.gov/advocacy.

Applicant submitted new documentation--a letter from a physician and other medical documentation--which was not part of the original record.

II. Analysis

Under the Physician Panel Rule, independent physicians render an opinion whether a claimed illness is related to a toxic exposure during employment at DOE. The Rule requires that the Panel address each claimed illness, make a finding whether that illness was related to a toxic exposure at DOE, and state the basis for that finding. 10 C.F.R. § 852.12.

As indicated above, the Applicant appeals the determination of the Panel with respect to the claim concerning asbestosis. In her appeal, the Applicant submitted new information including a letter from a physician discussing a chest x-ray performed on January 13, 2000 and pulmonary function tests conducted on March 27, 2000. The Applicant also submitted the results from the x-ray and pulmonary function tests from those dates. In his letter, the physician concluded that the Worker had asbestosis contracted through occupational exposure to asbestos.

The Applicant's submission of new information does not warrant a finding of Panel error. The Physician Panel makes its determination based on the records which are presented to it.

Moreover, in this case, we doubt that the new information would have changed the Panel's decision. The Panel acknowledged that the Applicant's late husband had a risk of asbestos exposure during his period of employment at the site. The Panel reviewed chest x-rays from 1974 through 1994, and from May 2001. The Panel determined that the 1974 through 1994 x-rays "were considered within normal limits" and that the May 2001 x-rays were "normal for age with no findings of any pneumoconiosis." Since the May 2001 x-rays post-date the 2000 x-rays, it is unlikely that the existence of the 2000 x-rays would have affected the Panel's decision.

As the foregoing indicates, the existence of this new information does not support a finding of Panel error and, for this reason, the appeal should be denied.

IT IS THEREFORE ORDERED THAT:

- (1) The appeal filed in Worker Advocacy Case No. TIA-0129 be, and hereby is, denied
- (2) This is a final order of the Department of Energy

George B. Breznay
Director
Office of Hearings and Appeals

Date: October 29, 2004